In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 954

CHRISTOPHER C. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted of willful failure to file his personal income tax returns for the years 1962 through 1965, in violation of Section 7203 of the Internal Revenue Code, and was sentenced to concurrent three months terms of imprisonment. The court of appeals affirmed (Pet. App. 9-14).

A fraud investigation of petitioner's tax returns by a special agent of the Intelligence Division of the Internal Revenue Service developed from what began

as a civil audit. In the course of his investigation, the special agent on several occasions questioned petitioner, both at his place of business and at a government conference room. The agent did not warn petitioner of the criminal overtones of the investigation or of his constitutional rights. As a result of the questioning, petitioner provided the agent with evidence subsequently introduced, without objection by him, at his criminal trial.

Petitioner asserts that *Miranda* warnings must be given to a taxpayer suspected of criminal tax violations at the time the investigation is referred to a special agent; that the failure to give petitioner such warnings in this case rendered the incriminating evidence obtained by the special agent inadmissible in his trial; and that admission of such evidence constitutes plain error within Rule 52(b) of the Federal Rules of Criminal Procedure that requires reversal of his conviction without regard to the lack of objection at trial. The court of appeals held that in any event there was no "plain error" within Rule 52(b). This decision is correct. See *Silber* v. *United States*, 370 U.S. 717; *Michel* v. *Louisiana*, 350 U.S. 91; *United States* v. *Atkinson*, 297 U.S. 157; *Dichner* v. *United States*, 348 F. 2d 167 (C.A. 1).

Moreover, the constitutional requirements of *Miranda* do not apply in the circumstances of this case, since at the time of the interviews petitioner was neither in custody nor otherwise deprived of his freedom in any significant way. See *Morgan* v. *United States*, 377 F. 2d 507 (C.A. 1); *United States* v. *O'Connor*, No. 7629, C.A. 1, October 16, 1970, peti-

tion for certiorari pending, No. 969, this Term; *United States* v. *Caiello*, 420 F. 2d 471 (C.A. 2), certiorari denied, 397 U.S. 1039; *United States* v. *Jaskiewicz*, No. 18,387, C.A. 3, September 28, 1970, petition for certiorari pending, No. 884, this Term; *United States* v. *Mancuso*, 378 F. 2d 612 (C.A. 4), certiorari denied, 390 U.S. 955; *United States* v. *Prudden*, 424 F. 2d 1021 (C.A. 5), certiorari denied, October 12, 1970, No. 453, this Term; *United States* v. *Miriani*, 422 F. 2d 150 (C.A. 6), certiorari denied, 399 U.S. 910; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Simon* v. *United States*, 421 F. 2d 667 (C.A. 9), certiorari denied, 398 U.S. 904; *Hensley* v. *United States*, 406 F. 2d 481 (C.A. 10). Petitioner contends that these decisions conflict with *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7), which held that *Miranda* warnings must be given "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division." But *Dickerson* was decided in 1969, after the interrogation in this case, and expressly made its rule applicable only "to interrogations taking place after the date of this decision," 413 F. 2d at 1117. Furthermore, in view of the present policy of the Internal Revenue Service to give virtually full *Miranda* warnings to all taxpayers when first interviewed by a special agent,[1] there should be few, if

[1] By news release dated November 26, 1968 (after the interviews in this case), the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including a proffer of legal aid unless the

any, further cases that would meet a different fate in the Seventh Circuit than in any other circuit. See *United States* v. *Campione*, 416 F. 2d 486 (C.A. 7), certiorari denied, 397 U.S. 909; *United States* v. *Townsend*, No. 18,159, C.A. 7, July 9, 1970, certiorari pending, No. 708, this Term; *United States* v. *Gallagher*, 430 F. 2d 1222 (C.A. 7). There is, therefore, no reason for further review by this Court.[2]

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taxpayer is in custody. The news release notes that this "new procedure goes beyond most legal requirements that are designed to advise persons of their rights." 1968 CCH Fed. T Reporter, par. 6946, 1968 Prentice-Hall Fed. Taxes, par. 5[illegible]-476. Contrary to the statement in the petition (p. 7) there was no Service practice of giving such warnings to taxpayers not in custody when petitioner was questioned.

[2] Petitioner's suggestion (Pet. 6-7) that his alcoholism and emotional disturbance constituted "custody" is without factual foundation even assuming, *arguendo*, the theory is correct. There was no evidence that petitioner had been drinking prior to any interview except the interview of November 16, 1966, and no substantive evidence was obtained at that meeting. In addition, the record fails to support any allegation that petitioner was so totally deprived of his rational orientation that he was effectively in "custody". Prior to and during this period petitioner was operating a funeral business and made capital improvements of over $16,000 to the business. He also entered into a real estate venture and traveled outside the continental United States three times (R. 76-78).

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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